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Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

APPELLANTS' OPPOSITION TO MOTIONS TO AFFIRM

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APPELLANTS' OPPOSITION TO MOTIONS TO AFFIRM

Despite its emphasis on the large "factual record" developed in the district court (*e.g.*, Gov't Motion 18; *see also* NAB/INTV Motion 12, 17; Public TV Motion 9-10), the Government's Motion to Affirm clearly confirms what a comparison of Judge Sporkin's and Judge Williams' opinions itself shows: the heart of the dispute about the validity of the must-carry law is neither factual nor complicated. So, too, the Government's invocations of deference to " 'Congress' factual predictions' " (Gov't Motion 18, quoting *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality); *see* Gov't Motion 29) are utterly beside the point. Once the feints in the direction of ultimately irrelevant interests are set aside, the Government has finally come to rest its defense of the must-carry law, as Judge Sporkin did, on a simple, protectionist interest: must-carry serves the interest of assisting the marginal broadcast stations who invoke its protections. The important question thus squarely presented is whether the must-carry law may now be sustained on the basis of this bare, newfound interest in aiding individual speakers.

The 1992 must-carry law is unconstitutional if the Government fails to demonstrate that the law's speech-targeted requirements are narrowly tailored to serve a real, nonconjectural, substantial interest. *Turner*, 114 S. Ct. at 2469-70. In seeking to carry that burden, the Government cannot play a kind of shell game by switching focus among various asserted government interests—some to which the law is not narrowly tailored (even if real and substantial), others that are not real (even if substantial in the abstract), others that are insubstantial (even if the law is narrowly tailored to them). To sustain the law, the Government is obliged to identify at least one real, substantial interest and show that the law is narrowly tailored to *that* interest. And it is particularly important that this requirement be a serious one if the yet-to-be clarified "intermediate" level of First Amend-

ment scrutiny is to play its proper role in disciplining the wide range of government impositions on free speech now subject to that standard. If this requirement is to have real meaning as a check on regulations of speech that reflect only political favoritism, the Government's newly asserted interest must be deemed insufficient to support must-carry's speaker-preference mandate.

1. *The Impact on Speech.* Far from *"incidentally* burden[ing] expression" (NAB/INTV Motion 13, 16 (emphasis added)), the must-carry law is a targeted and direct interference with a marketplace for speech. Its deliberate and immediate effect is to favor one set of speakers (broadcast stations) over another (cable programmers) by forcing cable operators to carry the former while leaving the latter to compete for any remaining capacity. And that discriminatory-carriage mandate has a real and continuing impact: a substantial amount of indisputably scarce capacity on cable systems is legally commandeered for broadcast stations and thereby foreclosed in perpetuity to the free editorial choice of cable operators to carry otherwise-preferred cable programmers, whose number far exceeds channel capacity (current or imminent).[1] The Government (Motion 22), like Judge Sporkin (J.S. App. 19a), focuses only on those particular broadcast stations that had to be added to cable systems on the effective date of the 1992 Act, but quite apart from the substantiality of even that burden in First

[1] The basic facts of foreclosure are straightforward. According to appellees' own evidence, the broadcast stations that did elect must-carry (thus excluding the many more that *could* elect must-carry in the future) accounted for 7% to 13% of cable channels. Half of all cable systems had no unused capacity, and appellees' own expert testified that unused capacity (even where it exists) is always temporary because it is built by operators for planned use. J.S. App. 90a-91a, 93a (Williams, J., dissenting). As for competition for that scarce capacity, it is undisputed that, "as of October 1994 an estimated 86% of cable systems had a maximum capacity of less than 54 channels," while "there are currently 128 national and 40 regional cable networks (i.e., programming channels available to cable systems)." *Id.* at 90a.

Amendment terms,[2] the blinkered disregard of the *ongoing* effect of the must-carry law is patently improper: the law also freezes in place, forever into the future, the large number of broadcast stations that were being carried on the effective date of the 1992 Act, prohibiting cable operators from dropping those stations for whatever reason and foreclosing all of that space to cable programmers. Since there are many more cable programmers seeking to be carried than capacity allows, the must-carry law's grant to broadcasters of a right of occupation has a substantial impact that demands to be justified.

2. *The Government Justification.* The Government has failed to advance a legally adequate justification for imposing these burdens. The Government's present defense of the law, after earlier reliance on preventing "anticompetitive" conduct and on preventing "devastation . . . wrought upon the broadcast *industry*,"[3] has finally come to rest on the single interest relied on by Judge Sporkin and identified in footnote 11 of his opinion: the interest in protecting certain individual *stations*. J.S. App. 8a-9a n.11. Because the must-carry law obviously is not narrowly tailored to any interest in preventing anticompetitive conduct, and because there is no jeopardy to over-the-air broadcast*ing* as a system, either nationally or in local markets, *see* pages 4-6 *infra*, the Government now defends the law as simply designed to aid, through its speaker-preference mandate, a group of individual broadcast stations, namely, those "economically vulnerable" stations who benefit from must-carry. Gov't Mo-

[2] For example, appellant Time Warner "added 240 broadcast stations to its systems because of must-carry and had to drop programming on 75 channels as a result." *Id.* at 93a.

[3] Transcript of Oral Argument at 38, 40 (emphasis added), in *Turner*, 114 S. Ct. 2445 (1994) (answers of Solicitor General); *see also* Brief for the Federal Appellees at 13, 15, 17, 27, 39, 40 n.27, in *Turner*, *supra*. *See also* J.S. App. 49a n.4 (Williams, J., dissenting) (quoting earlier NAB claims of systemic threat before district court in 1992).

tion 25; *id.* at 26; *see* J.S. App. 8a-9a n.11.[4] According to the Government, its preference for these stations is enough to justify coerced discrimination against other programming, even where the protected broadcast station is the 11th or 12th station in a market, even where the station is of little or no interest to viewers, and even where the operator prefers to carry a now-foreclosed cable programmer for the best of reasons, *i.e.*, better programming. But neither Judge Sporkin (in his one-judge "majority" opinion) nor the Government has explained just what important *governmental* interest such mandated discrimination is meant to serve.

a. *Protection Against Unfair Competition.* The interest in preventing anticompetitive acts by cable operators does not justify must-carry for the simple reason that, as Judge Williams explained, the must-carry law is grossly ill-tailored to any such interest. J.S. App. 96a-110a.[5]

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[4] "Must-carry rests on the premise that some broadcasters are economically vulnerable and would fail or significantly deteriorate if denied access to the large portion of the viewing public that subscribes to cable." Gov't Motion 25. The law is designed to promote "the survival of financially vulnerable stations." *Id.* at 26. After conceding that network-affiliated stations need no protection from must-carry, and then focusing only on UHF independents, the Government further narrowed its claim of what was at stake: "'[I]t is not the health of the average independent station that is at issue here, it is the ability of stations that have been denied carriage or repositioned to provide the same quality and quantity of programming . . . .'" J.S. App. 66a (Williams, J., dissenting) (quoting appellees' Fact Response).

[5] Most obviously, the law mandates carriage regardless of whether a cable operator wishes not to carry a broadcast station for anti-competitive reasons or in order to provide programming of more interest to its subscribers (a choice at the heart of the First Amendment). So, too, the law applies regardless of whether there is any vertical integration between the operator and a preferred programmer (an issue that, in any event, is addressed elsewhere in the 1992 Act). And, in classic bootstrapping fashion, the law mandates discrimination regardless of whether it is the Government itself through its laws, rather than any structural features of the industry, that has created an obstacle to equal treatment by cable operaors of broadcasters and cable programmers (for example, by pre-

Judge Sporkin nowhere disagreed with Judge Williams on that point: Judge Sporkin's entire narrow-tailoring analysis rests not on any interest in attacking unfair competition but, instead, on the straightforward view that the various suggested alternatives would not be equally effective in serving the separate interest in aiding the largest number of marginal individual broadcast stations. J.S. App. 22a-27a. Just as notably, the Government's discussion of the narrow-tailoring portion of the analysis in its Motion to Affirm (at 23-27) nowhere defends must-carry as narrowly tailored to any interest in preventing anticompetitive conduct by cable operators, but, like Judge Sporkin, relies on the identified interest in aiding broadcasters *simpliciter*. Thus, even if there were a factual basis for the asserted interest in preventing unfair competition, it simply cannot support a law requiring carriage of every station by every system regardless of the reason for preferring to carry other programming.

b. *Threat to the System.* The must-carry law likewise cannot be justified as serving any interest in preserving the overall health of broadcasting as a system, nationally or in any particular area, or indeed in protecting some never-yet-defined level of over-the-air broadcasting in any given community. Judge Sporkin—in the crucial step of his analysis, and the point on which his disagreement with Judge Williams ultimately turns—disowned any such system-protection interest (J.S. App. 8a-9a n.11), because there is no meaningful sense in which broadcasting as a whole is in jeopardy. The Government reaffirms, what it conceded below, that the statute cannot rest on any notion of a threat to broadcasting as a system. Gov't Motion 17; *see* J.S. App. 48a-49a (Williams, J., dissenting) (quoting appellees' concessions). The evidence laid out by Judge Williams explains why: *e.g.*, in the many years without any must-carry requirement, the number of broadcast stations unremittingly grew (to levels, indeed, that were impossible before cable *aided* broadcasting);

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venting broadcasters from providing advertising slots). *See, e.g.*, J.S. 18-19 & nn. 4, 5.

cable voluntarily carries most stations in terms of sheer numbers and virtually all (97 percent) in terms of viewership; and where non-carriage occurs, it is overwhelmingly of the little-watched stations in areas in which cable already is carrying a far higher number of stations than even exist in most areas. *See* J.S. App. 49a-61a, 64a, 69a-72a.[6] Thus, there is undisputedly no threat to broadcast*ing*—to "free, over-the-air local broadcast television" (*Turner*, 114 S. Ct. at 2469)—that could support must-carry's nationwide mandate of carriage, which must instead be defended on the ground that there is some substantial interest in protecting even an 11th or 12th station, little watched by viewers, in preference to more desired cable programmers.

c. *Protection for Individual Stations.* The interest relied on by Judge Sporkin and the Government, then, is an interest in preserving " 'the *greatest possible* multiplicity of broadcast outlets' " (J.S. App. 47a, 62a, quoting Government Reply at 5 (emphasis added by Judge Williams)) by assisting precisely the "vulnerable" broadcast stations that invoke the protections of must-carry. *See* J.S. App. 8a-9a n.11. As is perhaps most starkly revealed in Judge Sporkin's and the Government's explanation for why the "*Century* rules" would be "inadequate" to serve the relied-upon interest (Gov't Motion 26; *see* J.S. App. 23a)—simply that those rules would protect fewer stations than the 1992 Act (*ibid.*)—this

[6] Although the Government (Motion 15 n.10) suggests substantial non-carriage in communities served by only four broadcast stations, Judge Sporkin never relied on any such assertion, and for good reason. The basis for the assertion is an affiant's statement that is based on a sample size of only 15 stations and that is not only contradicted by the FTC's study (and appellants' evidence), *see* J.S. App. 72a, but undermined by the same affiant's earlier declaration showing 94% carriage rates in areas with three or four broadcast stations. *See* Dertouzos Rebuttal Dec. ¶ 16, Table A-3. In any event, the assertion is irrelevant to the defense of must-carry: if there were a governmental interest in ensuring carriage of some *minimal* number of broadcast stations, that interest could not justify must-carry's nationwide mandate of carriage of even the 11th or 12th station.

interest is nothing other than a naked protectionist "the more the better" interest in improving the lot of one class of speakers at the expense of others.[7] Although this attempt to redefine the interest has one seeming virtue (it makes the law look narrowly tailored), it is critically defective. First, it is the product of the very bootstrapping tactic condemned by this Court as a "circular defense" in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991), *i.e.*, "tak[ing] the *effect* of the statute and posit[ing] it as the [governmental] interest." And, second, it leaves the Government utterly unable to explain why this newly asserted interest is substantial enough to justify the must-carry law's preference for a little-watched 11th or 12th broadcast station (which has its own over-the-air outlet) at the expense of more attractive programming offered by a cable programmer (which lacks its own over-the-air outlet).

As Judge Williams explained (J.S. App. 46a-47a, 62a-63a, 67a, 72a), *Turner* is not sensibly read as endorsing as substantial any interest in this sort of protectionism. Most strikingly, the Court's remand for factual inquiry is inexplicable (and the factual development that occurred on remand a massive waste) if the question simply is whether those broadcast stations sufficiently marginal to invoke must-carry might benefit financially from the carriage required by must-carry.[8] And this Court's many

[7] Judge Williams explained: "All defendants have demonstrated is that, all else being equal, forced cable carriage is at least of some benefit to the broadcast stations so carried. But this alone can vindicate Congress's interest only if we take the valid interest to be, circularly, maximum possible expansion for broadcast." J.S. App. 66a-67a.

[8] J.S. App. 40a-41a (Williams, J., dissenting) ("once it is posited that must-carry would enhance the profits of the stations electing must-carry (a point that seems never to have been disputed), it is so obvious that must-carry will advance the interest in question that we not believe the Court would have remanded for fact-finding if it had concluded that such interests were adequate to sustain must-carry").

references to the "medium," the "industry," "local broadcast*ing*," "broadcast *television*" (114 S. Ct. at 2461, 2467, 2470, 2471 (emphasis added)), naturally reflect a concern with jeopardy to a *system* in some meaningful sense as a possible justification for the must-carry speaker-preference mandate. The Government responds by focusing entirely on the plurality's direction to inquire whether must-carry benefits " 'significant numbers' " of stations (Gov't Motion 19, quoting 114 S. Ct. at 2471), but the Government has excluded from its quote the very phrase that supplies the essential context for deciding what amounts to a "significant" number: "necessary to protect the *viability* of broadcast *television*." 114 S. Ct. at 2471 (emphasis added). It is implausible that the plurality "used 'significant' in a sense completely disembodied from the 'viability' of broadcast." J.S. App. 68a (Williams, J., dissenting).

Furthermore, even if an interest in protecting all broadcast*ers* at the expense of other speakers, divorced from any broader concern about jeopardy to broadcast*ing*, could ever justify a law like must-carry, Congress itself did not assert any such constitutionally delicate interest but, instead, repeatedly focused on protection of broadcasting as a whole. *See, e.g.*, Finding ¶ 16 (J.S. App. 117a); S. Rep. 92, 102d Cong., 1st Sess. 36, 42, 54, 55, 58, 60 (1991); H.R. Rep. 628, 102d Cong., 2d Sess. 51, 63, 64, 65 (1992).[9] This omission is especially striking, given that Congress extensively discussed the D.C. Circuit's decision in *Quincy Cable TV, Inc. v. FCC*,

[9] Judge Jackson seems to have recognized that *Congress*'s asserted interest in 1992 was in acting early to prevent "an impending demise of local broadcasting." J.S. App. 33a. Judge Jackson seems also to have read this Court's opinion in *Turner* to focus on the overall health of broadcasting. *See* J.S. App. 34a. Thus, on the question of what interest actually underlay the must-carry law, Judge Jackson appears to have agreed with Judge Williams, but then concluded that the evidence of the reality of that interest, at least if "taken at face value" (*id.* at 33a), might be substantial—a proposition that Judge Sporkin did not assert and the Government does not defend.

768 F.2d 1434 (1985), *cert. denied*, 476 U.S. 1169 (1986), which explicitly found a "critical" constitutional distinction between protection of "local broadcast*ing*" and protection of "local broadcast*ers*" (768 F.2d at 1460). Yet Congress said not one word to suggest that it was repudiating that distinction or acting to advance the "broadcast*er*" interest that *Quincy* had deemed "illegitimate" (*id.* at 1460). To the contrary, it attempted (unsuccessfully, as it turned out) to supply the *factual* basis for judging "broadcast*ing*" in jeopardy. *See* S. Rep. 92, *supra*, at 53-62; H.R. Rep. 628, *supra*, at 58-67.

The johnny-come-lately quality to the Government's sole defense of must-carry itself casts doubt on the substantiality of this interest. Adding to this doubt is the fact that there is no good reason to believe that, if (as has happened) neither the system-protection interests nor the unfair-competition interests asserted by Congress can support must-carry, Congress would nonetheless find it critical to protect marginal individual broadcasters even against wholly legitimate competition from more attractive cable programmers. The longstanding policy of the Communications Act, not repudiated by the 1992 Congress, is to the contrary. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("it is not the purpose of the Act to protect a licensee against competition but to protect the public"; a broadcaster must "survive or succumb according to his ability to make his programs attractive to the public"). And the Government seems to concede that Congress did *not* deem it important to "guarantee the survival even of broadcasters that do not engage the attention of the viewing public" (Gov't Motion 27), which are the very stations protected by must-carry. J.S. App. 69a-70a (Williams, J., dissenting).

The defense of the must-carry law has thus fallen apart. One interest (protection of the broadcast system) has proved not to be real; a second interest (protection against anticompetitive conduct) cannot support so broad a law; and the remaining interest (protection of individual stations), as in *Quincy*, has not been shown to be

substantial. Without an interest to stand on, the must-carry law should fall.

CONCLUSION

The Court should note probable jurisdiction and set the case for plenary briefing and argument.

Respectfully submitted,

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